87-1421

No.____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE CITY OF COLUMBUS, OHIO, et al., Petitioners,

V.

ANN BRUNET, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS

FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err when it dismissed as moot the appeal of Petitioners from a Title VII liability judgment and an injunction because the Petitioners had complied with an enumerated portion of the Injunction after their motion for a stay of the enumerated portion had been denied by both the trial and appellate courts?

2. Did the Court of Appeals err when it dismissed as moot the appeal of Petitioners from a Title VII liability judgment and an injunction holding the Judgment Entry filed by the Court was improper, the result of the dismissal being res judicata upon the issues raised in the appeal?

3. Did the Court of Appeals apply a technical rather than practical determination of finality which precluded Petitioners from Court of Appeals review of District Court decision which was in conflict with Supreme Court and Court of Appeals decisions?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, the City of Columbus, Ohio, the Columbus, Ohio Civil Service Commission, Dana G. Rinehart, Mayor of Columbus and Alphonso C. Montgomery, Public Safety Director.

The respondents before this Court include Lynn Walters Shearrow, Rebecca Schumacher, Edwina Hornung and Ann Brunet

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The Petitioners, City of Columbus, Ohio, et al., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above – entitled proceeding on August 25, 1987 and rehearing being denied on October 19, 1987.

OPINIONS BELOW

The Per Curiam Opinion of the Court of Appeals for the Sixth Circuit has not been published. It is contained in the appendix hereto, p.1a, infra.

The Opinions and Orders of the United States District Court for the Southern District of Ohio (Kinneary, D.J.) were reported at 642 F. Supp. 1214, and are contained in the appendix hereto, p.7a, infra. The Opinions and Orders of the District Court regarding the 1986 examination have not been published and are contained in the appendix hereto, p.100a, infra.

JURISDICTION

The Respondents brought the above-captioned cause of action in the United States District Court for the Southern District of Ohio pursuant to 42 U.S.C. § 2000e in November 1984. In January 1985, the Respondents sought and obtained leave to amend their complaint to allege a cause of action pursuant to 42 U.S.C. § 1983. The District Court, on January 17,

1986, issued an Order and Decision dismissing the claims under 42 U.S.C. § 1983 in respect to the 1980 female applicants. The District Court on May 13, 1986 rendered judgment for the petitioners in respect to 42 U.S.C. § 2000e for the 1980 examination and for the claims under 42 U.S.C.§ 1983 based on the 1984 examination. The District Court rendered judgment for the respondents in respect 42 U.S.C.§ 2000e for 1984 examination. On May 30, 1986 the District Court rendered an Opinion and Order in regard to the remedy upon the liability judgment. Both parties appealed from these decisions to the Sixth Circuit Court of Appeals.

The District Court, on May 21, 1987, rendered an Opinion and Order finding the 1986 examination content valid as modified. On June 12, 1987, the District Order ordered the petitioners to hire female applicants pursuant to ratio calculations submitted, for all future classes. Both parties have appealed from these decisions and these appeals are

pending. They are not at issue before this Court.

The petitioners, on June 26, 1987, filed a Motion to Stay Proportional Hiring pending the appeals from the May 1986 judgment. This motion was denied by the District Court. On July 7, 1987 the petitioners filed with the Court of Appeals an Emergency Motion for a Stay. The Court of Appeals denied the stay on July 10, 1987. The petitioners then hired the 1984 affirmative action female as required by the district court's orders.

On August 4, 1987, the parties appeared for oral argument and the Court of Appeals indicated that the appeals from the May 1986 Opinions and Orders were moot because the petitioners had proportionally hired 1984 females in fulfillment of the May 30, 1986 injunction. A Per Curiam decision was rendered on August 25, 1987 dismissing as moot the parties' appeals. The petitioners timely petitioned for rehearing and the petition was denied by the Court of Appeals on October 19, 1987.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1291. Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

Respondents, Lynn Walters Shearrow, Rebecca Schumacher and Edwina Hornung took the 1980 Columbus Firefighter Entrance Examination. Respondent Ann Brunet took all parts of the 1984 Columbus Firefighter Entrance Examination. Respondent Edwina Hornung only took a portion of the 1984 examination. These respondents filed on November 19, 1984, a class action complaint pursuant to 42 U.S.C.§ 2000e-5(f) alleging that they were discriminatorily denied firefighter entrance positions within the Columbus Division of Fire. Respondents Shearrow, Schumacher and Brunet, subsequent to the filing of the complaint, obtained right-to-sue letters. Respondent Hornung never filed a charge with the Ohio Civil Rights Commission or the Equal Employment Opportunity Commission.

Hiring examinations for the position of Firefighter in the Columbus Division of Fire were administered in 1978, 1980, and 1984. In each of these years females

were hired from the eligibility lists. The Respondents took and passed the written examinations and completed the physical capabilities test, which are separate components of the entrance process for applicants. As a result of the 1980 testing process, Ms. Shearrow ranked 193, Ms. Schumacher ranked 571 and Ms. Hornung ranked 319 on the non-minority eligibility list. Ms. Brunet ranked 464 on the 1984 non-minority eligibility list.

The respondents alleged in their complaint that the written test and the physical capabilities test had an adverse impact upon females and was not content valid or job related. In their amended complaint, the respondents alleged violation of 42 U.S.C.§ 1983 and the Fourteenth Amendment to the Constitution.

The District Court dismissed the claims of the 1980 female applicants for violations of 42 U.S.C.§ 1983 as barred by the the statute of limitations.

In January 1986 the petitioners filed a Motion for Partial Summary Judgment in regard to the claims of the 1980 female applicants for lack of adverse impact of the examination upon females. This motion was renewed at trial and the District Court reserved judgment. In its Opinion and Order of May 13, 1986, the District Court granted judgment pursuant to Fed. R. Civ. P. 41(b) for the petitioners on the Title VII claims of the 1980 female applicants. The District Court found no intentional discrimination as to the 1984 female applicants pursuant to 42 U.S.C. § 1983. The Court found that there was adverse impact upon females in the 1984 physical capabilities test and that the examination was not content valid, in violation of 42 U.S.C. § 2000e. The Court ordered the petitioners to prepare a new examination, obtain Court approval of the content validity of the new exam, administer the new test to all 1984 female applicants and set-aside positions for qualified females. A Judgment Entry was prepared by the clerk and filed on May 14, 1986.

On May 30, 1986, the District Court, after review of remedy proposals submitted by the parties, ordered the petitioners to prepare a report on the Content Validity of the previously prepared and administered 1986 Firefighter Entrance Examination, administer the new test to incumbent firefighters in order to determine a cut-score, administer the 1986 exam to all 1984 female applicants and, after the Court had determined whether the new exam is content valid and job-related, using an approved cut-score, determine the ratio of the 1986 male/females passing the test. The petitioners were then to apply this ratio to the 1984 applicants and determine now many females would have been hired absence discrimination. If more females would have been hired than actually were, this number of females would have to be hired before 1986 applicants. Petitioners were additionally ordered to hire 1986 females in proportion to their passing rate on the exam, though there had not been any determination of discrimination. Before petitioners could rank-order

hire from the examination, they were required to do a predictive and concurrent validity study. The District Court failed to discuss petitioners submission in their remedy proposal that, because of their performances on the content valid written exam, none of the non-minority females would have been hired, notwithstanding the discriminatory physical exam. A Judgment Entry was entered nunc pro tunc to May 30, 1986 on June 26, 1986.

In July 1986 the petitioners requested a modification of the Injunction to permit the hiring of firefighters pending the appeals and the validity study. The District Court permitted the hiring of 72 firefighters from the 1986 examination as long as there were set aside positions for 1984 and 1986 females.

During the briefing period for the appeals to the Court of Appeals, the petitioners submitted to the Court their Report on Content Validity and hired their first group of 36 firefighters under the Interim hiring order. The District Court in March 1987, conducted a two-day evidentiary hearing on the content

validity of the 1986 examination and the cut-score proposals. On May 21, 1987 the District Court issued an Opinion and Order finding the 1986 examination as modified content valid and job-related. The Court also issued its scoring scheme for the examination. On June 12, 1987, the Court approved the calculation of ratios for the female hiring and ordered the petitioners to hire one additional 1984 female and to proportionally hire male/females in all future firefighter classes.

The petitioners requested a stay from the proportional hiring requirement of the 1984 female and the 1986 females pending the appeals which were set for oral argument on August 4, 1987. Petitioners in their briefs upon appeal had argued that the District Court's Opinions and Orders were in conflict with several decisions of this Court and other Courts of Appeal on affirmative action remedies, adverse impact, content validity and scoring. In their requests for the stay, petitioners argued the requirement to hire the 1984 and 1986 females would

substantially harmed the status quo between the parties and the citizens of Columbus. The District Court denied the stay and the Court of Appeals denied the Emergency Motion for a Stay on July 10, 1987. The petitioners were then required, by denial of the stay, to hire one 1984 female applicant on July 13, 1987 which satisfied any remedy obligation under the present scoring scheme of the 1986 examination.

When counsel for the parties appeared for oral argument, the Court of Appeals inquired whether the appeals were moot because the petitioners had complied with the enumerated provisions of the May 30, 1986 injunction and in light of the June 12, 1987 injunction regarding the 1986 exam. The Court also indicated the Judgment Entry from the May 13, 1986 Opinion and Order was not a proper judgment entry from a final decision of the district court. Counsel for the petitioners renewed their request for a stay of the proportional hiring in light of its conflict with this Court's decisions in Local No. 28, Sheet

Metal Workers' International Association, et al. v. EEOC, __U.S.__, 92 L.Ed.2d 344 (1986). The Court indicated, from the bench, it would never issue a stay. The Court of Appeals issued its Per Curiam opinion on August 25, 1987 dismissing as moot the appeals. The petitioners timely filed a petition for rehearing which was denied by the Court of Appeals on October 19, 1987.

The petitioners, at the oral argument and in their petition for rehearing, argued that they had not complied with all the terms of the May 30, 1986 Injunction in that it would take them four or more years to complete the criterion-related studies. They argued that there was a Judgment Entry filed on May 14, 1986 which addressed and determined liability as to all claims in the complaint and was a judgment on the merits. Additionally, the compliance by the petitioners with the enumerated provisions of the Injunction was required by the Court's denial of the Motion for a Stay. The Petitioners pointed out to the Court of

Appeals that the dismissal as moot could be regarded as prejudicial to petitioners' right of appeal upon the liability finding and the substantial issues of law. If the Court of Appeals was correct that there was no judgment entry, the appeal was premature not moot. The petitioners argued that the Court ignored its own holding in Alexander v. Aero Lodge No. 735, International Asso., 565 F. 2d 1364, 1370 n.3 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978), and applied a technical rather than practical construction to finality and the relationship between the parties.

REASONS FOR GRANTING THE WRIT

I. The dismissal by the Court of Appeals of Petitioners' appeal from a Title VII liability judgment and injunction as moot was in error because petitioners'compliance with the injunction had been upon protest. This dismissal is in conflict with decisions of this Court and other Circuits.

The Court of Appeals in its Per Curiam Opinion of August 25, 1987 held that the District Court had not rendered a final judgment because there was ongoing litigation. The Court of Appeals did find, however, that it had jurisdiction over the appeals from the injunction issued on May 30, 1986. This injunction had required petitioners to demonstrate the content validity of their new 1986 exam, establish a cut-point, administer the exam to the 1984 female applicants, and determine the ratio for hiring of 1984 and 1986 female applicants. The petitioners were not able to rank-order hire until they submit both a predictive and concurrent criterion-related validity study, in addition

to its content validity report. The petitioners, in need of firefighters, submitted to the various steps within the injunction. After the District Court found the new exam to be content valid, the petitioners sought a stay of the proportional hiring requirement of the 1984 female who would satisfy petitioners' liability under the injunction and the hiring of future 1986 affirmative action recruits. Both the District Court and the Court of Appeals denied the stay, finding no detrimental harm to the petitioners. The petitioners reluctantly hired the additional 1984 female pursuant to the District Court's orders.

The Court of Appeals held in its opinion that the petitioners compliance with the hiring of the 1984 female completed compliance with the May 30, 1986 Injunction and mooted its jurisdiction.

The petitioners contend that all provisions of the May 30 Injunction have not been comply with, i.e., the predictive criterion-related study will take several years to complete. Primarily however, the petitioners argue that the compliance with the enumerated

provisions of the Injunction were completed under protest. If the petitioners had not hired this 1984 female, they would have been in contempt of a court order or left with the choice of not hiring any firefighters while awaiting the appellate process.

It is recognized principle that federal courts do not have jurisdiction over matters which are not in "case or controversy". It is a general proposition that a case can become moot where, while pending appeal and without fault of the parties, an event occurs resolving the issues between the parties or prevents the court from providing a remedy. Burke v. Barnes, et al., 479 U.S. _, 93 L.Ed.2d 732 (1987); Crowell, et al. v. Mader, et.al., 444 U.S. 505 (1980); Sosna v. Iowa, 419 U.S. 393 (1975). Ordinarily a party does not have to seek a stay from a judgment during an appeal. Thibaut v. Ourso, 705 F.2d 118 (5th Cir. 1983); American Grain Asso. v. Lee-Vac, Ltd., 630 F.2d 245 (5th Cir. 1980). The voluntary performance by a party of the act sought to

be enforced renders a case moot. Western Addition Community Organization,et al. v. Alioto, et al., 514 F.2d 542 (9th Cir. 1975). As the Ninth Circuit pointed out in Alioto, the City of San Francisco did not seek a stay of the District Court's hiring order pending appeal and hired the minority applicants. The case at hand is distinguishable. The City of Columbus sought and was denied a stay.

There must be an element of voluntary and intentional compliance with an order before a court loses its jurisdiction because of mootness. Otherwise, the lawful compliance by a party of an order, under protest, while an appeal is pending would deprive the party his Constitutional right of appeal. As in International Harvester Credit Corp. v. East Coast Truck, 547 F.2d 888 (5th Cir. 1977), the petitioners were not the voluntary beneficiaries of the "acceptance of the benefits" doctrine. The Fifth Circuit found the compliance by International Harvester with the district court's decree,

after denial of a stay, was done in face of the risk of contempt. Such compliance was found not to moot the appeal.

The Court of Appeals for the District of Columbia in Investment Company Institute v. Federal Deposit Insurance Corp., 728 F.2d 518,523 (D.C.Cir. 1984), held that even if a subsequent injunction mooted the injunction appealed, it would maintain the appeal "'in the interest of sound judicial administration,' if 'a recurrence or a continuation of what is essentially the same legal dispute' is predictable. Alton & Southern Ry. v. International Ass'n of Machinists & Aerospace Workers, 463 F.2d 872,879 (D.C.Cir. 1972)." (Footnote omitted). If the Court had maintained jurisdiction and reviewed the liability judgment and the injunction regarding the 1984 exam, the 1986 exam may not before the Court of Appeals

The petitioners respectfully contend that their involuntary compliance with the court's orders should not prejudice their rights to an appeal from the 1986 liability judgment and injunction.

II. The dismissal by the Court of Appeals of Petitioners' appeal from a Title VII liability judgment and injunction as moot results in a res judicata effect upon the issues raised on appeal without review, depriving the Petitioners of their Constitutional right of appeal from a District Court decision which is in conflict with decisions of this Court and other Circuits.

The Supreme Court in United States v. Munsingwear, 340 U.S. 36 (1950), held that where a case becomes moot while an appeal is pending from the district court, the appropriate practice is to reverse or vacate the judgment below and remand for dismissal by the trial court. Such a procedure would prevent the effect of res judicata upon the action. In Munsingwear, the United States did not did not move for vacation of the judgment and the Court held it had acquiesced in the dismissal. See, Burke v. Barnes, 479 U.S. __, 93 L.Ed.2d 732,737 (1987).

However, this Court in Crowell v. Mader, 444 U.S. 505 (1980), held that the previous order directing the judgment of the district court be vacated, because the matter had become moot during the pendency of the appeal, was improper. The Court held not the entire

case had become moot "but only the issues raised on appeal." Id. The parties could litigate other issues in the case. In this action, the parties are continuing to litigate the same issues, regarding test construction, content validity and rank-order hiring in respondents' appeal from the district court's approval of the 1986 exam, as were at issue in petitioners' appeal in this matter. The district court's supervision and administration regarding the 1986 examination stems from the liability finding of the underlying Title VII cause of action. Thus, the petitioners could not, pursuant to the holding in Crowell, move the Court of Appeal to remand and direct the district court to vacate the judgment.

Additionally, in this matter the petitioners, in their petition for rehearing, raised the issue of the res judicata effect of the dismissal as moot upon the liability findings of the district court and the provisions of the injunction upon which compliance

had not been completed. The Court of Appeals issued a summary dismissal of the petition. Thus, the petitioners sought relief from the res judicata effects of the dismissal as moot and did not acquiesce as did the United States in Munsingwear.

The Court of Appeals erred when it held that the petitioners had complied with all parts of the 1986 injunction but for the proportional hiring which was renewed in the 1987 injunction. The petitioners, at oral argument and in their petition for rehearing, indicated to the Court of Appeals that the petitioners had not complied with the criterion-related validity studies because these would take several years. The 1987 injunction only continues the proportional hiring requirements of the preceding injunction and directs that the petitioners may hire "by whatever method it desires so long as it is not inconsistent with any prior Orders of this Court." Opinion and Order of May 21, 1987, p.44 (Appendix 100a, infra.). Thus, petitioners have not been relieved of their obligation to perform

studies which are inconsistent with professional standards and decisions from other Circuits.

The petitioners raised upon appeal substantive issues regarding the district court's judgment in the liability finding and injunction which were in conflict with decisions of the Supreme Court, with other Circuits and with decisions of the Sixth Circuit. The res judicata effect of the Court of Appeals' dismissal as moot may prevent review of these same findings by the district court in its holding regarding the 1986 examination because it may be the "law of the case." The effect of the Court of Appeals' dismissal as moot is the denial of the petitioners' right to appellate review intended by Congress and the Constitution.

The petitioners are additionally being prejudiced because the Court of Appeals dismissed the appeals as moot when the appropriate action of the Court may have been to vacate the judgments and direct the district court to dismiss the cause. The petitioners raised the issue of res judicata in their petition but the

Court did not address it. The petitioners should not be deprived of their right of appellate review through actions of the Court of Appeals.

III. The Court of Appeals' determination on the finality of the District Court decision was in conflict with decisions of this Court and other Circuits.

The Court of Appeals found that since the district court had not determined the "legality" of the new 1986 entrance examination at the time of the appeals, litigation on the merits had not concluded and there was no final judgment. This finding of the Court of Appeals is in error. This Court in Catlin v. United States, 324 U.S. 229, 233 (1945), held that a final decision is one which "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." The district court, in its May 13, 1986 Opinion and Order, found liability upon the petitioners for the 1984 physical capabilities test under Title VII, no liability under Title VII for the 1980 entrance

examination or the 1984 written examination and no liability under 42 U.S.C.§ 1983 for intentional discrimination. The following day the clerk entered the Judgment Entry.

The rights between the parties were conclusively settled. The litigation on the merits between the parties was terminated and the district court had nothing to do but administer and enforce the execution of the liability determination. Heike v. United States, 217 U.S. 423 (1913).

The principles of finality have not been strictly construed by this Court. Pennsylvania v. Ritchie,480 U.S. __, 94 L.Ed.2d 40 (1987); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). This Court has held that because the question whether a ruling is final is frequently a close question, the requirements of finality should be given a "practical rather than a technical construction." Cohen v. Benefical Industrial Loan Corp., 337 U.S. 541, 546 (1949). While the concern to prevent piecemeal review is an appropriate

concern of the courts, there must be a balancing with the danger of denying justice by delay of an appeal. Dickinson v. Petroleum Conversion Corp.,338 U.S. 507,511 (1950); Gillespie v. United States Steel Corp., 379 U.S. 148,153 (1964).

The Sixth Circuit has held that a:

> final judgment is one which disposes of the whole subject, gives all the relief that was contemplated, provides with reasonable completeness, for giving effect to the judgment and leaves nothing to be done in the cause save superintend, ministerially, the executive of the decree.

City of Louisa v. Levi, 140 F.2d 512, 514 (6th Cir. 1944).

The District Court, as part of the remedy for the liability finding, required the petitioners to demonstrate the content validity of their new examination. There had not been a finding of adverse impact in the results of the 1986 exam which would have established a prima facie case under Title VII. Rather, the court was administering its remedy from the liability finding in regard to the 1984 exam. There have not been any new findings of liability in this

matter after the May 13, 1986 Opinion and Order. The litigation on liability has ended. The district court is currently executing its judgment. Catlin v. United States, supra.

The Court of Appeals during oral argument indicated that while there may have been "a piece of paper which said Judgment Entry, it is not a judgment entry." The Judgment Entry prepared by the Clerk of the Court and filed on May 14, 1986 follows the specifications of the complaint and enters judgment for the respective parties under 42 U.S.C.§ 2000e or 42 U.S.C.§ 1983. It appears that the Court of Appeals is rendering a technical rather than practical construction to the finality rule and Fed. R. Civ. P.58.

If the Court of Appeals is correct that there has been no "final" judgment in this matter, the appeal on liability is, at least, premature not moot. The dismissal of the appeals as moot then is error and prejudical to the rights of the petitioners.

CONCLUSION

The petitioners respectfully request the Supreme Court that this petition for certiorari be granted. The petitioners believe the Questions presented raise substantial issues regarding Constitutional rights of appellate review, as well as conflict between the Court of Appeals and prior decisions of the Supreme Court and other Circuits. The petitioners request the Court to exercise its supervisory authority over the Court of Appeals and accept review of the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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